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In this edition of Inside Deloitte, Schiefelbein looks at laws that seven U.S. jurisdictions have enacted to impose their state corporate income tax on income allegedly shielded by taxpayer use of "tax havens." The author provides an overview of each jurisdiction's tax haven law and offers insights into the relative strengths and weaknesses of the respective measures.

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Introduction

The term "tax haven"¹ may lack a precise, universal definition, but one can recognize the general characteristics: tax rates that range from low to nonexistent, a lack of transparency, no effective exchange of relevant information, and no requirement that the taxpayer have substantial business activity in the jurisdiction.² Similarly, the annual U.S. income tax benefit gained by multinational taxpayers through use of foreign tax havens (or, depending on your perspective, the amount of tax revenue allegedly "lost") is also difficult to quantify. However, by any measure, the total annual dollar amount of tax benefit or lost tax revenue may be roughly estimated in the billions of dollars.³

¹Notwithstanding the use of the term "tax haven," the author does not endorse the application of that term to any specific jurisdiction.

²See Multistate Tax Commission Proposed Model Statute for Combined Reporting, section 1.1 (July 29, 2011).

³The debate among policymakers over whether the use of so-called tax havens causes the U.S. government to lose revenue or is legitimate tax planning is beyond the scope of this article. However, estimates indicate that the revenue at issue is considerable. As an example, the

(Footnote continued in next column.)

Many state governments are also paying close attention to the issue because they perceive a corresponding loss of state tax revenue. Most states impose corporate income taxes and generally use federal taxable income as the starting point for calculating state taxable income. Accordingly, if a dollar of income is not in federal taxable income, that dollar will also generally escape taxation in many states. Given the amount of alleged revenue loss at the federal level, it should be no surprise that some of the estimates for the state tax revenue loss are also substantial.⁴

With significant tax revenue at stake, the absence of a uniform approach from Congress, and the near-universal requirement of state governments to operate under balanced budgets, many state governments have considered or have already adopted their own measures to tax income allegedly shielded by taxpayer use of tax havens.

Seven jurisdictions — Montana, Oregon, Alaska, West Virginia, Rhode Island, Connecticut, and the District of Columbia — have enacted their own laws to tax this income. This article will briefly examine each jurisdiction's tax haven laws and will offer insights into the relative strengths and weaknesses of the respective measures.⁵

Montana

In 2003 Montana became the first state to adopt a tax haven law. Montana requires corporate taxpayers engaged in a unitary business to file combined corporate income tax returns worldwide unless a valid water's-edge election is

_____ Congressional Research Service notes that "estimates of the revenue losses from corporate profit shifting vary substantially, ranging from about \$10 billion to about \$90 billion, or even higher," Jane Gravelle, "Tax Havens: International Tax Avoidance and Evasion," Congressional Research Service (Jan. 15, 2015), at 1.

⁴Phineas Baxandall et al., "Closing the Billion Dollar Loophole: How States Are Reclaiming Revenue Lost to Offshore Tax Havens," U.S. PIRG (Winter 2014), at 7 (estimating the state tax revenue loss from offshore tax havens for state governments at \$20.7 billion for 2011).

⁵Although beyond the scope of this article, it is conceivable that tax haven laws may present constitutional challenges (for example, based on the foreign commerce clause).

made.⁶ Therefore, Montana's tax haven provision is only relevant for electing taxpayers that file as a water's-edge group because taxpayers filing worldwide combined returns will already include the tax haven entities in the return. A Montana corporate taxpayer filing a combined return under a water's-edge election must include in the Montana combined return, *inter alia*, the taxable income and apportionment of unitary affiliates that are incorporated in any one of 40 listed tax haven jurisdictions.⁷ The Montana Department of Revenue must report to the State Legislature every two years with an update regarding the countries that could be considered tax havens and thus be on the Montana list.⁸

Specifically designating tax haven jurisdictions, occasionally referred to as the "blacklist" approach,⁹ simultaneously offers the benefits of clarity and simplicity while inviting the burden of controversy. Listing specific jurisdictions as tax havens makes it easy for all interested parties to determine whether the state considers a specific entity to be incorporated in a tax haven. Montana law provides that the connection to the jurisdiction is based solely on where the business entity is incorporated, regardless of where the entity conducts business or what taxes it pays. As will be discussed below, other state tax haven laws focus on where the corporation is doing business, which can be more difficult to ascertain.

The benefits of simplicity can have downsides. For example, by focusing solely on where an entity is incorporated, Montana's law ignores the nature of the corporation's business activity and where that activity occurs, which could lead to results contrary to the purpose of the state's tax haven law. State tax haven laws are often promoted as a means for a state to tax income that a taxpayer has shifted outside the United States, such as transferring intangible assets to offshore subsidiaries.¹⁰ However, under the Montana approach, the state does not need to show that such income shifting has occurred. For example, a Montana taxpayer that

has a unitary affiliate incorporated in Luxembourg that operates a manufacturing facility in France and sells the products throughout Europe and Asia would also be considered having a tax haven affiliate even if there is no shifting of U.S.-sourced income to the Luxembourg corporation. In such a scenario, the fact that the manufacturing entity may pay substantial amounts of tax in France (the site of its manufacturing facility) or any other jurisdiction would be irrelevant to its status as a tax haven entity.

Designating countries as tax havens also invites political controversy. As one could expect, countries generally do not appreciate being designated as tax havens.¹¹ Montana has recently received communications opposing the tax haven designation from representatives of Ireland, Luxembourg, Switzerland, and the Netherlands, some of which referenced potential reduced direct foreign investment in Montana.¹² It is reasonable that a nation identified as a tax haven would consider retaliatory policies in response to such a designation, particularly after representatives of the country have voiced their opposition to the state.

While the tax haven law of Montana may have an adverse effect on some taxpayers, they may have an opportunity to mitigate those effects. As noted previously, the tax haven law applies only to taxpayers that have filed a water's-edge election because if a Montana taxpayer files on a worldwide basis, the taxpayer should include all its unitary affiliates in its Montana return rather than just those incorporated in tax havens. It is possible that a taxpayer may be in a better position filing on a worldwide basis than on a water's-edge basis that includes tax haven entities. The Montana water's-edge election is made for renewable three-year periods.¹³ Accordingly, water's-edge taxpayers affected by Montana's tax haven law should compare the water's-edge method with the worldwide combined filing method to determine if making or renewing the water's-edge election would be beneficial.

Oregon

Oregon followed Montana's lead in 2013 and adopted its first tax haven statute.¹⁴ Unlike Montana, Oregon is generally a water's-edge jurisdiction that follows the federal consolidated return and does not allow for worldwide combined filing.¹⁵ For tax years beginning on or after January 1, 2014, Oregon requires taxpayers to include in the Oregon consolidated return unitary affiliates incorporated in listed

⁶Mont. Code Ann. section 15-31-322; Mont. Admin. R. 42-26-204, -301.

⁷Mont. Code Ann. section 15-31-322(1)(f). The jurisdictions are Andorra, Anguilla, Antigua and Barbuda, Aruba, the Bahamas, Bahrain, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Cyprus, Dominica, Gibraltar, Grenada, Guernsey-Sark-Alderney, Isle of Man, Jersey, Liberia, Liechtenstein, Luxembourg, Malta, Marshall Islands, Mauritius, Monaco, Montserrat, Nauru, Netherlands Antilles, Niue, Panama, Samoa, San Marino, Seychelles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Turks and Caicos Islands, U.S. Virgin Islands, and Vanuatu.

⁸Mont. Code Ann. section 15-31-322(2). The Montana State Legislature is not required to act on these recommendations.

⁹See, e.g., Daniel M. Dixon et al., "To Blacklist or Not to Blacklist — The Trend Toward State Tax Haven Laws," *State Tax Notes*, Sept. 8, 2014, p. 635. See also Evan Hoffman, Organization for International Investment, and Ferdinand Hogroian, Council On State Taxation, Testimony Before Oregon House Committee on Revenue for HB 2099 (Apr. 2, 2015).

¹⁰See Baxandall et al., *supra* note 4, at 1, 8.

¹¹See, e.g., Amy Hamilton, "Letters From Ambassadors Show Fight Against Tax Haven Label," *State Tax Notes*, Feb. 10, 2014, p. 327.

¹²*Id.*

¹³Mont. Code Ann. section 15-31-324(2).

¹⁴2013 Oregon Laws, Chapter 707 (enacting HB 2460).

¹⁵Or. Rev. Stat. section 317.710(2); Or. Admin. R. 150-317.710(5)(a)-(B)(1).

jurisdictions.¹⁶ The tax haven list of jurisdictions¹⁷ was derived from Montana's list, except that Oregon does not include Panama. Similar to Montana, the Oregon tax haven statute requires the Oregon DOR to report to the Legislative Assembly every two years with recommendations for additions to or deletions from the list.¹⁸

On January 1, 2015, the Oregon DOR submitted its report recommending the addition of several countries, including the Netherlands, Switzerland, Guatemala, Hong Kong, Trinidad and Tobago, and the five jurisdictions that formerly made up the Netherlands Antilles.¹⁹ The report also recommended the removal of Monaco.²⁰

Oregon's 2015 tax haven legislation received more attention than its 2013 legislation. When initially proposed in 2013, Oregon's tax haven law was merely one part of a larger legislative package of tax increases and spending reforms, informally referred to by some as the "grand bargain."²¹ When the larger legislative effort failed, the 2013 legislature passed the tax haven portion of the package but without extensive debate.²²

In the 2015 legislative session, the Oregon tax haven bills received written objections from the governments of several countries as well as in-person testimony from Dutch representatives. The affected governments were not pleased with the state's efforts to designate them as tax havens. The Netherlands emphasized its importance and scope as a "major industrial and trading country, deeply integrated into the European Union," that is far more than a home for holding companies licensing intellectual property to U.S. businesses.²³ Based in part on that testimony, the Oregon legislature became aware that blacklisting based on where com-

panies are incorporated could have the unintended consequence of taxing companies that were not actually benefiting from a tax haven.

The Oregon blacklist debate also highlighted the arbitrary nature of the list and that the approach put state legislatures in the position of picking winners and losers. For example, neither Montana nor Oregon lists Ireland as a tax haven despite the belief of some that Ireland qualifies. This could possibly expose the Oregon tax haven law to constitutional challenge.²⁴ Members of the House Revenue Committee were aware that by focusing on the income earned by corporations incorporated in listed jurisdictions, Oregon may be taxing income that was not directly connected to the unitary business activity engaged in by the taxpayer in Oregon, and that was not the purpose of the statute.²⁵

To reflect that concern, the Oregon legislature considered amendments to Oregon's tax haven law that would have attempted to bifurcate income earned by the unitary affiliates incorporated in listed jurisdictions into two categories — income earned by the U.S. business (and therefore subject to tax in Oregon) and income earned from foreign jurisdictions (and therefore not taxable in Oregon).²⁶ Ultimately, the legislature was unable to draft satisfactory legislation and instead "solved" the problem by putting the responsibility for bifurcating the income of the foreign affiliates onto the taxpayer through the use of alternative apportionment petitions to be attached to the Oregon corporate excise tax return.²⁷

The 2015 changes, which go into effect for tax years beginning on or after January 1, 2016, added Guatemala as well as Trinidad and Tobago to the list of tax haven jurisdictions, removed Monaco, and reflected the dissolution of the Netherlands Antilles by adding Bonaire, Curacao, Saba, Sint Eustatius and Sint Maarten to the list.²⁸ Ultimately, the legislature refused to act on the DOR's recommendation that other countries (for example, the Netherlands, Switzerland, and Hong Kong) be added to the state's tax havens list.

The debate in Oregon highlighted many of the same issues first raised in Montana. However, despite those issues, and the dissatisfaction with Oregon's blacklist approach expressed by some Oregon lawmakers,²⁹ Oregon has retained and expanded its tax haven laws.

¹⁶2013 Oregon Laws, Chapter 707, sections 2, 5. That 2013 legislation included the list of tax havens in Or. Rev. Stat. section 317.715; in 2015, as will be discussed herein, the Oregon legislature moved the list of jurisdictions to Or. Rev. Stat. section 317.717.

¹⁷Unlike Montana, the Oregon statute does not refer to jurisdictions as "tax havens," although the effect of the list is the same.

¹⁸2013 Oregon Laws, Chapter 707, section 4.

¹⁹Oregon Department of Revenue, "Recommendations on Tax Haven Jurisdictions" (Jan. 1, 2015). The blacklist approach confirms the need to stay current on world events; when the Oregon legislature copied the Montana list of jurisdictions in 2013, it failed to recognize that the Netherlands Antilles dissolved as a jurisdiction in October 2010 and was replaced by the now-independent jurisdictions of Bonaire, Curacao, Saba, Sint Eustatius, and Sint Maarten. *Id.*

²⁰*Id.*

²¹See Christian Gaston, "Grand Bargain in the Oregon Legislature: Tax Vote Fails," *Oregonian.com* (July 2, 2013).

²²See Eric J. Kodesch and Elizabeth S. Shellan, "2013 Oregon Legislative Sessions: Tax Law Developments," *Oregon State Bar Taxation Section Newsletter*, vol. 16, no. 3 (Fall 2013).

²³See, e.g., Alan Tressidder, "Backgrounder Oregon Netherlands," submitted to the Oregon House Committee on Revenue (Mar. 25, 2015); "Comments by the Netherlands on the Recommendations on Tax Haven Jurisdictions HB 2460 From the Oregon Department of Revenue, January 1, 2015," submitted to the Oregon House Committee on Revenue (Apr. 2, 2015).

²⁴See Ferdinand Hogroian, Council On State Taxation, Testimony Before the Oregon House Committee on Revenue (Apr. 2, 2015).

²⁵See Phil Barnhart, Chair, Oregon House Committee on Revenue (Apr. 2, 2015).

²⁶See, e.g., HB 2099-4 (May 18, 2015).

²⁷2014 Oregon Laws, Chapter 755; see also Paul Warner, legislative revenue officer, and Joe DiNicola, Oregon Department of Revenue, Testimony Before the House Committee on Revenue (July 1, 2015).

²⁸2015 Oregon Laws, Chapter 755.

²⁹See, e.g., Sen. Mark Hass (D), Chair, Oregon Senate Committee on Finance and Revenue (June 16, 2015) ("If it was up to me, this would not be part of our tax code . . ." and calling for its ultimate repeal).

In one other intriguing change, Oregon's 2015 legislation also added a provision to the Oregon statutes establishing criteria the DOR must use to determine whether an entity is a tax haven. The criteria mirror those adopted by the Multistate Tax Commission (discussed in greater detail below).³⁰ Oregon's enactment of those criteria does not change Oregon's blacklist approach but provides guidelines that will be used for future DOR recommendations. Perhaps unexpectedly, the legislation does not state whether the legislature must use those criteria to evaluate the department's recommendations. The inclusion of those criteria in the Oregon statutes also raises the possibility that a jurisdiction, dissatisfied with its inclusion on the list, could use those criteria to challenge its designation as a tax haven by the legislature (that is, the country could offer evidence that the jurisdiction does not satisfy the statutory criteria).

Alaska

Other states have adopted different methods to combat the use of tax havens. Alaska, for example, requires most taxpayers to file on a water's-edge basis, although oil and gas companies are required to file on a worldwide combined basis.³¹ For taxpayers that file on a water's-edge basis, the water's-edge combined group includes, *inter alia*, entities that are either incorporated or doing business in tax haven jurisdictions.³²

That provision differs from the Montana and Oregon tax haven approaches in two key respects.

First, while Montana and Oregon focus solely on where the entity is incorporated, the Alaska standard includes both the jurisdiction of incorporation and the jurisdictions in which the foreign affiliate is doing business. By connecting the tax haven definition to where taxpayers are doing business, the Alaska tax haven statute is connecting its definition more closely to the general apportionment concept of state taxation, which generally attempts to source income to jurisdictions based on the extent of the taxpayer's business activity.

The other key difference between Alaska's tax haven regime and those of Montana and Oregon is that Alaska does not list specific jurisdictions as tax havens but instead adopts its own substantive definition. Alaska tax law defines a tax haven as:

A country that does not impose an income tax, or that imposes an income tax at a rate lower than 90 percent of the United States income tax rate on the income tax base of the corporation in the United States, if (A) 50 percent or more of the sales, purchases, or payments of income or expenses, exclusive of payments for intangible property, of the corporation are made directly or

indirectly to one or more members of a group of corporations filing under the water's edge combined reporting method; (B) the corporation does not conduct significant economic activity.³³

By using that definition, Alaska avoids some of the issues that were raised during the recent discussion of Oregon's blacklist approach. The Alaska definition uses two criteria to define corporations that are subject to Alaska's tax haven regime: corporations that enter into substantial intercompany transactions with other members of the water's-edge filing group and corporations that do not conduct significant economic activity.³⁴ Under Alaska's approach, if a foreign unitary affiliate is incorporated or does business in a jurisdiction that otherwise qualifies as a tax haven (for example, does not impose an income tax) but does not enter into substantial intercompany transactions as defined by Alaska statute and engages in significant economic activity, then the corporation is *not* in the Alaska water's-edge group. That provision may help mitigate the risk of Alaska taxing the legitimate operating income of foreign unitary affiliates.

While Alaska's approach may be more flexible and tailored more specifically to address the alleged abuses created by foreign tax havens than the Montana and Oregon blacklist regimes, it requires that the taxpayer make a more complex determination as to whether it is subject to Alaska's tax haven system. In Montana and Oregon, the taxpayer need only look to where its unitary foreign affiliates are incorporated. For Alaska purposes, the taxpayer must also look to (a) where its foreign unitary affiliates are doing business; (b) whether the foreign jurisdiction imposes a net income tax; (c) if a net income tax is imposed, how the rates compare with the U.S. corporate income tax rate; and (d) the business activities of the foreign unitary affiliate. While a determination of whether a taxpayer is subject to the Montana or Oregon approaches is relatively simple, the Alaska determination could require an extensive analysis that must be updated or reviewed annually.

The MTC Model — West Virginia, Rhode Island, and Connecticut

As part of its various initiatives to promote uniformity across state tax regimes, the MTC has adopted a Model Statute for Combined Reporting.³⁵ The model statute provides for a default worldwide combined filing method, but for taxpayers that elect to file a water's-edge return, the

³⁰2015 Oregon Laws, Chapter 755, section 4.

³¹Alaska Stat. section 43.20.031(i); Alaska Admin. Code section 20.330(a), (c).

³²Alaska Stat. section 43.20.145(a)(5).

³³*Id.*

³⁴*Id.*

³⁵See MTC, Proposed Model Statute for Combined Reporting, Aug. 17, 2006 (amended July 29, 2011), *available at*: <http://bit.ly/1FXfMUy>.

model statute specifies that the taxable income and apportionment of the combined group include “the entire income and apportionment factors of any member that is doing business in a tax haven.”³⁶

The model statute initially incorporated the list of tax haven regimes identified by the Organisation for Economic Cooperation and Development as a tax haven or as “having a harmful preferential tax regime.”³⁷ In 2000 the OECD published a report specifying those jurisdictions, but by 2009 each of the jurisdictions had either made changes or committed to make changes to the satisfaction of the OECD that they should no longer be listed as tax havens.³⁸

After those changes, the MTC updated the model statute to provide that a tax haven jurisdiction is any jurisdiction that has no or nominal effective tax on the relevant income and:

- has laws or practices that prevent effective exchange of information for tax purposes with other governments on taxpayers benefiting from the tax regime;
- has a tax regime that lacks transparency (a tax regime lacks transparency if the details of the legislative, legal, or administrative provisions are not open and apparent or are not consistently applied among similarly situated taxpayers or if the information needed by tax authorities to determine a taxpayer’s correct tax liability, such as accounting records and underlying documentation, is not adequately available);
- facilitates the establishment of foreign-owned entities without the need for a local substantive presence or prohibits those entities from having commercial impact on the local economy;
- explicitly or implicitly excludes the jurisdiction’s resident taxpayers from taking advantage of the tax regime’s benefits or prohibits enterprises that benefit from the regime from operating in the jurisdiction’s domestic market; or
- has created a tax regime that is favorable for tax avoidance, based upon an overall assessment of relevant factors, including whether the jurisdiction has a significant untaxed offshore financial/other services sector relative to its overall economy.³⁹

The model statute’s definition of a tax haven jurisdiction is considerably more detailed than either the blacklist approach or Alaska’s more subjective approach. Similar to the Alaska definition, the model statute focuses on where the given entity is doing business, but unlike Montana, Oregon, and Alaska, the model statute does not take into account the jurisdiction of incorporation.

Given that those provisions were originally conceived by the OECD, which is not a taxing agency but an organization designed to promote both the “economic and social well-being of people around the world,” they can be seen as reasonably objective in terms of tax policy as opposed to proposed provisions drafted by a particular industry or special interest group.⁴⁰ Perhaps as a result, those criteria are extensively detailed and involve the most complexity in terms of determining whether a particular jurisdiction qualifies as a tax haven.

Notwithstanding the potential complexity required to evaluate those criteria, some states are looking to the provisions when adopting their own tax haven regimes. For example, for tax years beginning in 2009, West Virginia requires taxpayers to file on a combined basis, and taxpayers filing under a water’s-edge election must include members that are doing business in a tax haven in the water’s-edge combined return.⁴¹ West Virginia defines a tax haven as a jurisdiction that, for the tax year at issue, is identified by the OECD as a tax haven or that meets the criteria adopted by the MTC for defining a tax haven.⁴²

Similar to Alaska’s, the West Virginia tax haven regime attempts to exclude from its provisions those taxpayers that are not using the tax haven to shift income outside U.S. taxation. The West Virginia statute provides that if the relevant member’s business activity in the tax haven is “entirely outside the scope of the laws, provision and practices that cause the jurisdiction to meet the criteria” of a tax haven, the member is not considered to be doing business in a tax haven.⁴³

By adopting a measure consistent with the MTC provisions, the West Virginia State Legislature advances the cause of uniformity among state taxing authorities. While uniformity in state taxation is widely considered a laudable goal, to date only a small number of states have adopted tax haven provisions that are also based on the MTC provisions.

For example, for tax years beginning on or after January 1, 2015, Rhode Island has adopted a mandatory water’s-edge combined filing regime.⁴⁴ As part of that regime, Rhode Island adopted a definition of tax haven that mirrors the MTC definition.⁴⁵ Unfortunately for advocates of uniformity, other than using the MTC’s definition, the Rhode Island tax haven regime does not strictly follow the provisions of any other state or the MTC.

A basic overview of Rhode Island’s complex combined return regime that applies to tax years beginning on or after January 1, 2015, is necessary to understand how Rhode

³⁶*Id.* at section 5(A)(vii).

³⁷Bruce Fort, MTC counsel, “Memorandum re Project to Amend ‘Tax Haven’ Provisions in Model Statute for Combined Reporting,” MTC (Feb. 28, 2011).

³⁸See OECD, “List of Unco-operative Tax Havens,” available at: <http://bit.ly/1OITCwq>

³⁹MTC model statute at section 1(I).

⁴⁰The mission statement of the OECD can be found at <http://www.oecd.org/about/>.

⁴¹W.Va. Code section 11-24-13f(a)(7).

⁴²W.Va. Code section 11-24-3a(a)(38).

⁴³W.Va. Code section 11-24-13f(a)(7).

⁴⁴R.I. Gen. Laws section 44-11-4.1(a).

⁴⁵R.I. Gen. Laws section 44-11-1(8).

Island tax law addresses tax havens. In general, a combined return is mandatory for C corporations that are engaged in a unitary business in which the corporations have more than 50 percent of their voting stock owned by a common owner (directly or indirectly).⁴⁶

The complexity of the Rhode Island combined group rules quickly becomes apparent. Any corporation that is not incorporated in the United States will be excluded from the Rhode Island combined return if its sales factor outside the United States is 80 percent or more.⁴⁷ However, if a non-U.S. corporation is in the Rhode Island combined group, the income and apportionment factors of that corporation are excluded from the combined group's taxable income to the extent that entity's income is subject to the provisions of a federal tax treaty.⁴⁸

That exclusion, however, does not apply if the non-U.S. corporation is organized in a tax haven country, as defined by Rhode Island law.⁴⁹ Thus, the income and apportionment factors of a corporation organized in a tax haven country would be in the Rhode Island combined return.⁵⁰ There is an exception to that exception, however. If the non-U.S. corporation is incorporated in a tax haven country that has a tax treaty with the United States, that corporation's income subject to the federal tax treaty, as well as corresponding expenses and apportionment factors, will be excluded from the Rhode Island combined return if either:

- the transactions conducted between the non-U.S. corporation and the other members of the combined group are conducted at arm's length and not with the principal purpose of avoiding the payment of Rhode Island corporate income taxes; or
- the member establishes that the inclusion of such net income in the combined group's net income is unreasonable.⁵¹

Despite its complexity, the Rhode Island tax haven regime may have the narrowest applicability of any state tax haven provision. The tax haven designation is relevant only if a corporation has its income excluded from Rhode Island taxation under a tax treaty with the United States, and then is subject to its own exceptions. Unlike the blacklist approach, which has no exceptions, the Rhode Island regime appears to be narrowly tailored in an attempt to tax only income that has been improperly shielded from Rhode Island taxation.

Connecticut also adopted its own tax haven regime in 2015, and it applies for tax years beginning on or after January 1, 2016, along with the state's new mandatory

combined reporting regime.⁵² The default filing method for Connecticut is the water's-edge method, but taxpayers will be able to elect to file on a worldwide combined basis.⁵³

For Connecticut taxpayers filing on a water's-edge basis, the Connecticut combined group will include any member that is incorporated in a jurisdiction determined by the tax commissioner to be a tax haven "unless it is proven to the satisfaction of the commissioner that such member is incorporated in a tax haven for a legitimate business purpose."⁵⁴

The Connecticut approach is an unusual blending of the blacklist and MTC-model approaches. As stated above, the commissioner must determine whether a jurisdiction is a tax haven, but for that purpose, Connecticut's tax haven definition closely follows the MTC definition, although there is no requirement that the regime in question impose "no or nominal tax on income."⁵⁵ While those laws take effect on January 1, 2016, the commissioner will be required to publish a list of tax haven jurisdictions by September 30, 2016, and the list shall apply from January 1, 2016, until superseded by a subsequent list published by the commissioner.⁵⁶

The Connecticut tax haven regime offers a few protections for affected taxpayers. First, the taxpayer may consider filing on a worldwide combined basis. Second, and perhaps more important, the taxpayer may also attempt to demonstrate to the commissioner's satisfaction that the taxpayer is incorporated in the tax haven for a "legitimate business purpose." The second option raises several questions involving the amount of evidence that must be provided by the taxpayer and the standard by which the commissioner will judge the evidence. However, it is promising for taxpayers that Connecticut at least provides an avenue to show, based on actual business activity, that the tax haven designation for a jurisdiction should not operate to adversely affect tax liability.

As mentioned above, the Connecticut tax haven regime incorporates both the MTC approach to the tax haven issue as well as the blacklist approach. While the state has generally adopted the MTC's tax haven definition, it appears to serve only as a guideline for the commissioner to adopt a blacklist of tax havens. Ultimately, unless the commissioner identifies a jurisdiction as a tax haven in published guidance, a jurisdiction will not be considered a tax haven. Accordingly, while the criteria of a tax haven are set by statute, it remains to be seen how the commissioner will apply those tests when designating specific jurisdictions. As we have

⁴⁶R.I. Gen. Laws sections 44-11-1(l)(c), -4.1(a).

⁴⁷R.I. Gen. Laws section 44-11-4.1(d).

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.*

⁵²Conn. Gen. Stat. sections 12-213(a)(29), -222(g)(1). The Connecticut combined group is based on the concepts of a unitary business and has set its common ownership threshold at more than 50 percent. See Conn. Gen. Stat. section 12-213(a)(31)-(32).

⁵³Section 144(a)-(c), Act 15-5 (SB 1502), Laws 2015, June Sp. Sess.

⁵⁴*Id.* at section 144(b)(4).

⁵⁵*Id.* at section 144(b)(5).

⁵⁶*Id.*

seen with Oregon and Montana, states can draw different conclusions regarding what jurisdictions should be designated as tax havens, and Oregon has proved that the legislature may reject the DOR's recommendations when it comes to designating a jurisdiction.

By including the list of criteria in the statute that the commissioner must use to adopt its tax haven blacklist, Connecticut potentially opens the commissioner's tax haven designations to legal scrutiny, as both taxpayers and the applicable jurisdictions may seek to challenge the designations as inconsistent with Connecticut's adoption of the MTC definition. That is similar to the issues presented by the Oregon law adopted this year but with one fundamental difference. The Oregon law provides that the state legislature creates the list of tax havens, based on the DOR's recommendations, and it is the department, not the legislature, that is bound by the MTC's tax haven criteria. Conversely, the Connecticut regime requires the commissioner to designate tax havens under statutorily defined criteria. Accordingly, the Connecticut regime places the MTC definition of tax haven in a much stronger position in the discussion over what qualifies as a tax haven than does the Oregon regime.

The timing of the commissioner's publication of the Connecticut list of tax havens may have its own significance, given that the deadline is well over halfway through the year in which the tax haven regime becomes effective. Consequently, a taxpayer that is subject to penalties and interest on underpayment of estimated taxes in 2016 under any retroactively effective list may wish to consider requesting penalty relief.⁵⁷

The Hybrid Model: The District of Columbia Adds a Blacklist

Effective for tax years beginning after 2010, the District of Columbia adopted a water's-edge combined reporting regime that allows for a worldwide combined filing election or for requirement of worldwide combined reporting when necessary to reflect "proper apportionment of income of the entire unitary business."⁵⁸ In a water's-edge return, District taxpayers must include "the entire net income and apportionment factors of any member [of the District combined group] that is doing business in a tax haven defined as being engaged in activity sufficient for that tax haven jurisdiction

to impose a tax under United States constitutional standards."⁵⁹ However, the District provided an exception:

If the member's business activity within a tax haven is entirely outside the scope of the laws, provisions, and practices that cause the jurisdiction to meet the criteria of a tax haven, as that term is defined [in District tax law], the activity of the member shall be treated as not having been conducted in a tax haven.⁶⁰

That exception, based on the nature of the taxpayer's business activity in the tax haven, mirrors the West Virginia exception discussed above.⁶¹ Those two jurisdictions, along with Alaska, Rhode Island, and Connecticut, recognize that a taxpayer's presence in a tax haven jurisdiction may not be motivated by the jurisdiction's alleged status as a tax haven and, therefore, have provided a means whereby a taxpayer can establish that it should not be subject to the state's tax haven regime. As discussed above, Montana and Oregon generally do not provide an exception of that type.

When the District adopted its combined reporting regime, it defined a tax haven by using the MTC's model definition.⁶² However, on August 11, 2015, District Mayor Muriel Bowser (D) signed the Fiscal Year 2016 Budget Support Act of 2015⁶³ into law. The act provided that it became effective on October 1, 2015, although the act was subject to a congressional review period before it officially became law.⁶⁴

Among its provisions, the act contained a "clarification" to the District's tax haven definition. While the act retained its definition of a tax haven, it now provides that a tax haven also includes any one of 39 listed jurisdictions, which is essentially the Montana list of jurisdictions, except the District excludes Panama.⁶⁵ So, unlike any other jurisdictions, the District's tax haven law includes both a subjective list and a blacklist of specific jurisdictions. The City Council is to review that list "biennially or as needed," while the District's chief financial officer may submit amendments to that list of jurisdictions for the council's consideration.⁶⁶

That combination of standards offers both clarity and the possibility of confusion. Although a list of jurisdictions will make it easier for taxpayers to identify those jurisdictions that the District considers to be tax havens, that list is not exclusive. Accordingly, the taxpayer's inquiry stops only if it

⁵⁷Connecticut's tax haven legislation also provided that the "designated member of a combined group shall be responsible for paying estimated tax installments . . . on behalf of the taxable members of the combined group and in the form and manner prescribed by the Commissioner of Revenue Services." *Id.* at section 152. It is possible that the commissioner may provide guidance for how to calculate and report estimated taxes based on any retroactive list of tax havens and that such guidance could potentially include penalty relief resulting from such retroactivity.

⁵⁸D.C. Code sections 47-1805.02a(a)-(b); -1810.07(a)-(c).

⁵⁹D.C. Code section 47-1810.07(a)(2)(G)(i).

⁶⁰D.C. Code section 47-1810.07(a)(2)(G)(ii).

⁶¹W.Va. Code section 11-24-13f(a)(7).

⁶²D.C. Code section 47-1801-04(49).

⁶³D.C. Act 21-148 (August 11, 2015).

⁶⁴*Id.* at Title X, section 10001.

⁶⁵D.C. Code section 47.01.04(49)(B-i); *see* Mont. Code Ann. section 15-31-322(1)(f). The District's list recognizes and addresses the dissolution of the Netherlands Antilles. D.C. Code section 47.01.04(49)(B-i)(xxix).

⁶⁶D.C. Act 21-148, at subtitle P, section 7182, *supra*.

confirms that it has affiliates doing business in listed jurisdictions. Should the taxpayer have affiliates doing business in other jurisdictions considered by some to be tax havens, such as Ireland, Hong Kong, and Switzerland, the taxpayer must still apply the subjective criteria to those jurisdictions. Given that the District is analyzing where those entities are doing business, which can include a significant number of jurisdictions, that could be quite burdensome to affected taxpayers.

Further, the combined-standard approach raises the question of what happens if a country changes its tax laws so that it no longer meets the criteria of a tax haven but is still blacklisted by the District. Presumably, the taxpayer could argue that because of a change in law, the country does not have the characteristics of a tax haven and, accordingly, should not be treated as one (that is, an argument similar to the “outside the benefits of the tax haven” exception adopted by the District). However, any such argument would be contrary to the clear designation of the jurisdiction as a tax haven.

Unlike Montana and Oregon, which focus on where an entity is incorporated, the District’s provisions focus on where the entity is doing business.⁶⁷ That is an important distinction, as the doing business standard leads directly to the District’s exception to tax haven treatment, discussed above, under which taxpayers operate in a manner outside the jurisdiction’s status as a tax haven.

Conclusion

The tax haven laws of the seven jurisdictions were each adopted with the goal of enabling the taxation of income that had been shifted by taxpayers overseas, but those laws vary widely in the methods of taxing such income. Montana and Oregon have adopted a relatively simple blacklist approach based on where the entities are incorporated. While those provisions are seemingly arbitrary in their designation of jurisdictions as tax havens and focus solely on where the

entities are incorporated (as opposed to where they are doing business), the approach offers the benefits of clarity and simplicity, allowing a taxpayer to determine fairly easily whether it has affiliates incorporated in those jurisdictions. However, Oregon, at least, through its recent clarification of the role and importance of using alternative apportionment petitions to explain how the income and apportionment of those foreign unitary affiliates should be computed, appears to be acknowledging that simplicity comes with unacceptable costs.

Alaska, Connecticut, the District of Columbia, Rhode Island, and West Virginia offer more flexible tax haven regimes, each with its own exceptions. Those standards are generally derived from the OECD/MTC criteria for tax havens, but that is as far as the uniformity seems to extend. As a result, taxpayers that may be subject to those rules will likely need to invest substantial time and resources (including significant compliance costs) in determining how the rules apply and whether an exception may be available.

One common theme throughout all those tax haven laws is the concept of regular updates: The blacklists are not set in stone, and the subjective tests will need to be applied as the foreign jurisdictions update and amend their tax laws. As the OECD saw from its original designation of several countries as tax havens, those countries may object and take further steps if they are designated as tax havens. Affected taxpayers would be wise to monitor tax law changes in the tax havens and consider notifying state governments of those changes as well.

The variety of approaches adopted by the seven jurisdictions in their efforts to address tax havens may potentially be attributable to the absence of federal guidance. The lack of state uniformity has resulted in taxpayers spending considerable time and financial resources to fulfill their obligations to comply with the state laws. The question thus arises whether that expenditure of taxpayer resources suggests a need for federal legislation that could establish uniform standards but could also result in unintended consequences for taxpayers. ☆

⁶⁷D.C. Code section 47.1810-07(a)(2)(F)(i).